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C. H. H. H.
Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188130

DATE: March 30, 1978

MATTER OF: City and County of San Francisco

DIGEST:

Where court dismisses suit and enters judgment for Government, it is apparent that court is no longer interested in receiving views of GAO, even though court previously expressed "interest" in GAO decision. Therefore, GAO will not consider protest involving same material issues as those involved in court suit.

On June 10, 1976, the Department of the Navy, Naval Sea Systems Command, Washington, D.C. (Navy) and Triple "A" Machine Shop, Inc. (Triple "A") entered into a contract under request for proposals N00024-76-R-0001, for the leasing of naval property known as Hunters Point Naval Shipyard, San Francisco, California. On January 7, 1977, the City and County of San Francisco, California (San Francisco), alleging certain irregularities in connection with the award, protested to this Office.

In March 1977, San Francisco filed suit in the United States District Court for the Northern District of California (Civil Action No. C-77-0545 SW) raising the same material issues protested here. On June 3, 1977, the court issued an order stating that "insofar as GAO would, but for the pendency of the * * * lawsuit, proceed to determine the bid protest * * * the Court has no objection to, and expresses an interest in any such determination." On November 25, 1977, the causes of action involving the issues protested were dismissed, and subsequently the court entered judgment in the Government's favor. We have been informed that San Francisco is presently appealing the matter.

It is the policy of this Office not to decide matters where the material issues are before a court of competent jurisdiction unless the court expresses

an interest in receiving our views. 4 C.F.R. 20.10 (1977); Computer Machining Technology Corporation, B-181440, B-182150, B-184335, February 9, 1976, 76-1 CPD 80; Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44. San Francisco maintains that the court's order of June 3, 1977 constitutes that expression of interest. The Navy, on the other hand, asserts that the court, in issuing the order, did not intend to request a GAO decision and is not expecting one. In support of its position, the Navy refers to the transcript of the court proceedings in which the court states:

"I am going to ask the GAO to [remove] their inhibitions * * *. If they wish to not proceed, it is up to them. But: I'm going to free them of whatever it is that's required to do what they might otherwise do."

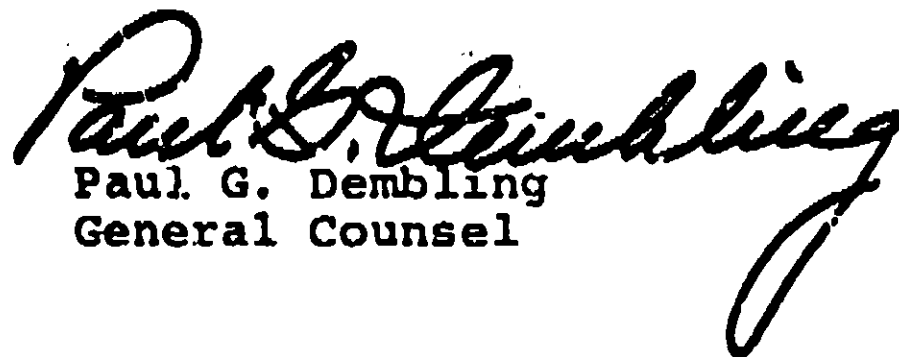
During our consideration of the effect of the court's June 3 order, we were informed by Navy counsel that motions for dismissal and summary judgment had been filed by the Government and that a ruling was expected shortly. Because it thus appeared that the court was not interested in our decision, and in any event because of the possible impact of such a ruling on the matter before us, we decided to hold further action in abeyance pending that ruling and so informally advised the parties. No objections were received, and it was not until after the court's dismissal order that the protester requested that we "again commence" our consideration of the matter.

We find that the matter is inappropriate for consideration on the merits. In Associated General Contractors of Massachusetts, Inc. and Construction Industries of Massachusetts, Inc.; Perini Corporation and King Erectors, Inc., A Joint Venture, B-187359, October 26, 1977, 77-2 CPD 326, we declined to render a decision on the merits where the matter was also the subject of litigation and the court had expressed "no objection" to consideration of the case by this Office, because we did not regard the court's statement as indicating "any particular interest by the court in receiving our views." Although here the

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court's statement is less clear, it appears that the court may now view its order as one directing us to consider the case on the merits, since the November 27 memorandum of the court contains a footnote stating that "On June 3, 1977, this Court ordered the GAO to proceed with the bid protest review." Nevertheless, in view of the court's order of dismissal and subsequent entry of judgment, it is apparent that the court is not interested in our views at this time. Moreover, under Rule 41(b) of the Federal Rules of Civil Procedure, the court's dismissal of the causes of action for, variously, failure to state a claim upon which relief can be granted, and lack of jurisdiction over the subject matter," appears to operate as an adjudication on the merits. See Hall v. Tower Land and Development Company, 512 F. 2d 481 (5th Cir. 1975).

Accordingly, we conclude that the matter has been and is the subject of litigation, and that under section 20.10 of our Bid Protest Procedures there is no basis for our further considering the matter. Schiavone Construction Co., Inc., B-191112, February 22, 1978, 78-1 CPD ____.


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General Counsel